

STATEMENT OF THE CASE

Appellant-Defendant, Michael A. Davis (Davis), appeals his conviction for delivery of cocaine, a Class B felony, Ind. Code § 35-48-4-1(a)(1)(C).

We affirm.

ISSUES

Davis raises two issues on appeal, which we restate as follows:

- (1) Whether the trial court abused its discretion in denying his motion to continue which was filed on the morning of the jury trial; and
- (2) Whether his sentence is inappropriate in light of the nature of the crime and his character.

FACTS AND PROCEDURAL HISTORY

On May 18, 2006, Detective James Anderson (Detective Anderson) of the Elkhart Police Department, Detective Travis Adamson (Detective Adamson) of the Elkhart County Sheriff's Department, and a confidential source conducted a controlled buy investigation in which they attempted to purchase narcotics from Eugene Burton (Burton), a.k.a. Stank. Both detectives were part of the Elkhart County Interdictions and Covert Enforcement Unit. During the controlled buy, Detective Anderson was responsible for the surveillance and security while Detective Adamson accompanied the confidential source during the attempted deal.

Detective Adamson and the confidential source went to 230 West Jackson Boulevard in Elkhart County, Indiana. When they arrived at the building, they knocked on Burton's

door but nobody answered. However, upon returning to the main hallway, they encountered Burton entering the building. Detective Adamson gave Burton one hundred dollars for crack cocaine. Burton informed Detective Adamson and the confidential source that he had to “go get it” and left them waiting in the hallway. (Transcript p. 87). Based on past experience, the confidential source did not believe that Burton would return with the cocaine.

While waiting for Burton to return, Detective Adamson and the confidential source noticed Davis passing them in the hallway numerous times. Davis asked Detective Adamson if he needed anything which Detective Adamson, based on his experience, understood as an offer to sell drugs. After leaving and returning four to five times, Detective Adamson agreed to deal with Davis. Both Davis and Detective Adamson went outside to the parking lot where Detective Adamson agreed to purchase crack cocaine for thirty dollars. They entered Davis’ car, and Davis pulled the cocaine from underneath his driver’s seat. After testing the cocaine Davis had sold, it was determined that Detective Adamson had purchased 0.21 grams of cocaine.

On August 28, 2006, the State filed an Information charging Davis with delivery of cocaine, a Class A felony, I.C. § 35-48-4-1(a)(1)(C). This Information was later amended, reducing the charge to a Class B felony. Although Davis was initially represented by counsel assigned by the Public Defender’s Office, his original attorney left the Office resulting in the assignment of a new attorney on September 24, 2007. However, when Davis’ second counsel left the Public Defender’s Office, Davis’ case was reassigned to his original counsel who had re-joined the Office. On February 9, 2009, a jury trial commenced. This day also

coincided with Davis' counsel first day back with the Public Defender's Office. At the start of the trial, Davis' counsel filed a motion to continue the trial to investigate a possible alibi witness. The trial court denied this motion. At the close of the evidence, the jury found Davis guilty as charged. On February 26, 2009, the trial court sentenced Davis to twenty years in the Department of Correction.

Davis now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Motion to Continue

First, Davis contends that the trial court abused its discretion when it denied his motion to continue. Specifically, he claims that he should have been granted more time to investigate and speak with potential alibi witnesses. Davis does not argue that he was entitled to a continuance by statute pursuant to I.C. § 35-36-7-1. Rulings on non-statutory motions for continuance lie within the discretion of the trial court and will be reversed only for an abuse of that discretion and resultant prejudice. *Jackson v. State*, 758 N.E.2d 1030, 1033 (Ind. Ct. App. 2001). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* Furthermore, we note that continuance motions made on the first morning of trial are not favored because granting them causes substantial loss of time for jurors, witnesses, lawyers and the court. *See Roberts v. State*, 500 N.E.2d 197, 199 (Ind. 1986).

We find that Davis' motion for a continuance lacked merit. On the morning of trial, Davis' counsel requested a continuance of the trial court for the express purpose to

investigate the issue of a potential alibi witness. Upon questioning by the trial court, counsel acknowledged that Davis “should have brought this to defense counsel’s attention long before yesterday.” (Tr. p. 15). The record reflects that Davis never informed his first counsel, who represented him for about five months, nor did he tell his next counsel that there might be an alibi witness. Continuances for additional time to prepare for trial are generally disfavored, and courts should grant such motions only where good cause is shown and such a continuance is in the interest of justice. *Jackson*, 758 N.E.2d at 1033.

Even though the trial court denied the motion for continuance, the court left open the question of introducing the potential alibi witness as a witness at trial even though the time for informing the State of an alibi had expired. At the end of the hearing on the motion to continue, the trial court noted as follows

Now, [counsel], you have an investigator with the public defender’s office. . . . I would suggest that if you wish to do so, you may want to send that investigator to find this potential alibi witness, and then I will be happy to address the issue of the defendant’s failure to comply with the alibi notice question.

(Tr. pp. 17-18).

During the trial, the following exchange took place between the trial court and Davis’ counsel:

[TRIAL COURT]: Before we proceed with testimony, it’s my understanding that [counsel’s] investigator located the purported alibi witness; is that correct?

[COUNSEL]: Yes, Judge. That’s correct.

[TRIAL COURT]: And that you actually spoke to this person by telephone; is that also correct?

[COUNSEL]: That is correct, yes.

[TRIAL COURT]: Do you intend to pursue your efforts to call this person as a witness?

[COUNSEL]: No. Based on the conversation, I'm not, Judge, no.

(Tr. p. 79).

Based on this evidence, we cannot say that Davis was prejudiced by the trial court's denial of his motion to continue. *See Jackson*, 758 N.E.2d at 1033. Davis' counsel talked to the potential alibi witness during the trial court's proceedings and informed the court that, based on his telephone conversation, he ceased his efforts to have the witness testify. As such, we affirm the trial court's ruling.¹

II. Sentence

Next, Davis contends that his sentence was inappropriate based on the nature of the offense. Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

¹ In so far as Davis now asserts that his counsel requested a continuance because he did not have enough time to prepare for trial as the day of trial was his first day back with the Public Defender's Office, we find the argument waived because Davis' counsel never made this argument before the trial court. *See Hape v. State*, 903 N.E.2d 977, 996-97 (Ind. Ct. App. 2009), *trans. denied* (a party may not raise an argument for first time on appeal).

Turning to the nature of the offense, we note that Detective Adamson bought 0.21 grams of cocaine for thirty dollars. While we agree with Davis that the nature of the crime is not particularly egregious, we nevertheless conclude that it does not offset the significant effect of his character. As we stated above, both the nature of the crime and character of the offender must be inappropriate before we can reduce the sentence. Here, we find that Davis' extensive criminal history justifies the imposition of the twenty year sentence. Davis' criminal history reflects seven prior felonies, ranging from, among others, handgun possession, auto theft, burglary, and possession of cocaine. He even committed an eighth felony, receiving stolen property, a Class D felony, after committing the instant offense. In addition, he has been convicted of eight misdemeanors. Furthermore, his juvenile career involved adjudications for, among others, "report on weapon" and "strong arm robbery," which resulted in Davis being committed to the Indiana Boys School. (Appellant's Suppl. App. p. 3). In other words, Davis has been involved with the criminal justice system as an adult over thirty years, and including his juvenile history, he has been familiar with the system for almost forty years. Given the volume of offenses and the long time span over

which Davis has been committing crimes, we find that his character justifies his lengthy sentence. We affirm the trial court's imposition of his sentence.

CONCLUSION

Based on the foregoing, we conclude that trial court did not abuse its discretion in denying Davis' motion to continue on the morning of trial; and Davis' sentence is not inappropriate in light of the nature of the crime and his character.

Affirmed.

VAIDIK, J., and CRONE, J., concur.